including the insurance proceeds in respect of the loss of the vessel.

On an ex parte application to Mocatta J, the learned judge gave leave for service on the shipowners out of jurisdiction and granted a Mareva injunction against them. The matter came before Kerr J on an application by the shipowners to set aside the service of notice of the writ and all subsequent proceedings. Kerr J granted the application but also gave the cargo owners leave to appeal to the Court of Appeal. On appeal, the Court of Appeal by a majority (Lord Denning MR and Lawton LJ, Bridge LJ dissenting) reversed the judgment of Kerr J and restored the Mareva injunction as originally granted by Mocatta J. The appeal then went before the House of Lords.

Order 11 of the English Rules of the Supreme Court permits the High Court in England to grant leave to a plaintiff to serve its process on a person outside the territorial limits of England and Wales in those cases, but only in those cases, that are specified in sub-paras (a) to (o) of r 1(1) or in r 2. Accordingly, it is not permissible in any action commenced by service of process on a person out of the jurisdiction to litigate any claim that does not fall within one or other of the said sub-paras (a) to (o). Thus the House of Lords allowed the appeal and restored the judgment of Kerr J which set aside the writ and all subsequent proceedings.

The other thing to be noted is that unlike our present case, there was no valid cause of action in '*The Siskina*'.[2] The cargo owners had no legal or equitable right or interest in the insurance moneys payable to the shipowners in respect of the loss of the vessel. All that they had was a claim to monetary compensation arising from a cause of action against the shipowners which is not justiciable in the High Court in England without the shipowners' consent — which they had withheld.

We may also mention that the application by the appellant in the present case for the interlocutory injunction was grounded exclusively on para 15 and 16 of the supporting affidavit, the translation of which reads as follows:

> 15 By her solicitor's letter dated 30 August 1990 the first defendant questioned the said rights issue. A copy of the said letter is shown to me and annexed to this affidavit marked 'KST-3'. I gather from the said letter that the defendants will attempt to exercise their rights as registered shareholders to obtain a declaration on technical grounds that the said rights issue is invalid before the determination of the suit herein.
>
> 16 In the premises, I would suffer irreparable damage, ie the loss of 173,625 ordinary shares (12,375 + 61,500 + 99,750 ordinary shares), if the defendants are not restrained by injunction from acting as stated in para 15. Moreover, I would become a minority shareholder in the list of registered shareholders of the said company.

In the affidavit-in-support to dissolve the injunction, it was stated clearly that there could not be any loss or irreparable damage to the appellant as the shares of the respondents could not be transferred without the approval of the board of directors. It was also revealed in the same affidavit that the respondents had been advised that they had grounds to institute proceedings against the company and the directors under the Companies Act 1965 and to enforce their legitimate rights as shareholders of the company.

We agreed with the learned judge that under the circumstances, the interlocutory injunction should be dissolved and dismissed the appeal but made no order as to costs. Deposit to be refunded.

Appeal dismissed.

Solicitors: *Gan Teik Chee & Ho; Thillaimuthu & Phock Kin.*

Reported by *Prof Ahmad Ibrahim*

Yap Fook Cheong & Anor v Burkill (Malaya) Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-368-1990
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
5 JULY 1991

Civil Procedure — Appeal to Supreme Court — Amount or value of subject matter of claim less than $100,000 — Leave of Supreme Court or judge of High Court required — Courts of Judicature Act 1964, s 68(1) & (2)

In this case the first respondent had obtained a default judgment against the appellants who were directors of a company for the sum of $67,360.69 with interest. The company made an application to set aside the default judgment but this was dismissed, as was an application for stay of execution. The first respondent then applied for a winding-up order and by order dated 8 September 1986 the second respondent was appointed liquidator. Some three years afterwards on 8 August 1989 the appellants took out a writ to challenge the winding-up order. The first respondent applied to strike out the statement of claim on grounds that it disclosed no reasonable cause of action, was misconceived and an abuse of the process of the court. The learned trial judge ordered the writ and statement of claim to be struck out. The appellants appealed. A preliminary objection was raised that the appeal was not properly before the court on the ground that no leave had been obtained under s 68(1)(a) of the Courts of Judicature Act 1964.

Held, upholding the preliminary objection:
As the amount or value of the subject matter of the claim was less than $100,000 the appeal could only be brought with leave of the Supreme Court or a judge of the High Court under s 68(1)(a) of the Courts of Judicature Act 1964.

[**Bahasa Malaysia summary**

Di dalam kes ini responden pertama telah mendapat penghakiman ingkar untuk jumlah $67,360.69 dan bunga terhadap perayu-perayu, yang merupakan pengarah-pengarah sebuah syarikat. Syarikat itu telah membuat permohonan untuk mengenepikan penghakiman ingkar itu akan tetapi permohonan itu telah ditolak, dan kemudian ditolak juga permohonan untuk penggantungan pelaksanaan penghakiman itu. Responden pertama memohon mendapat perintah penggulungan syarikat itu dan dengan perintah yang dibuat pada 8 September 1986 responden kedua telah dilantik sebagai likuidator. Hampir tiga tahun kemudian pada 8 Ogos 1989 barulah perayu-perayu mengeluarkan writ untuk mencabar perintah penggulungan itu. Responden pertama telah memohon membatalkan pernyataan tuntutan itu atas alasan ia tidak menzahirkan kausa tindakan yang munasabah, ia adalah dibuat dengan salahtanggapan dan ia adalah penyalahgunaan proses mahkamah. Hakim yang arif telah memerintahkan writ dan pernyataan tuntutan dibatalkan. Perayu telah membuat rayuan. Bantahan permulaan telah dibuat bahawa rayuan itu tidak dibawa sewajarnya di hadapan mahkamah atas alasan kebenaran untuk merayu tidak diberi di bawah 68(1)(a) Akta Mahkamah Kehakiman 1964.

Diputuskan, membenarkan bantahan permulaan:
Oleh kerana jumlah atau nilai perkara di dalam tindakan itu adalah kurang daripada $100,000, rayuan itu hanya boleh dibawa dengan kebenaran Mahkamah Agung atau hakim Mahkamah Tinggi di bawah s 68(1)(a) Akta Mahkamah Kehakiman 1964.]

Cases referred to

1 *TO Thomas* v *KCI Reddy & Anor* [1974] 2 MLJ 87 (distd)
2 *Central Securities (Holdings) Bhd* v *Haron bin Mohd Zaid* [1980] 1 MLJ 304 (distd)
3 *Sinnathamby & Anor* v *Lee Chooi Ying* [1987] 1 MLJ 110 (folld)
4 *Studham* v *Stanbridge* [1895] 1 QB 870 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 68(1), (2)
Rules of the Supreme Court 1980 rr 22A, 49(1)

Appeal from: Civil Suit No D3-22-1693-89 (High Court, Kuala Lumpur)

Low Hop Bing for the appellants.
Gerard Chan (*Voon Ah Kam* with him) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The instant appeal is against the decision of the learned judge of the High Court (VC George J) who allowed an appeal from the decision of the senior assistant registrar refusing to strike out the statement of claim of the appellants pursuant to an application under O 18 r 19 of the Rules of the High Court 1980.

The background facts may be briefly stated as follows. The two appellants were directors of a company known as Urachom Foam (M) Sdn Bhd ('the company') against whom default judgment had been obtained by the first respondent in Civil Suit No C1802 of 1984 for the sum of $67,360.69 with interest at the rate of 12% from 1 September 1983 to date of realization and costs.

The company made an application to set aside the default judgment. The application was dismissed on 14 January 1986. On 6 February 1986 the company made another application for stay of execution of the judgment. That application was also dismissed with costs on 17 April 1986. The first respondent then successfully applied for a winding-up order and by order dated 8 September 1986 in Kuala Lumpur High Court Companies Winding Up No 204 of 1985 the second respondent was appointed liquidator.

On 8 August 1989, the appellants took out a writ and in the statement of claim sought to challenge the winding-up order. The grounds were mainly on procedural matters. The statement of claim also alleged that the first respondent failed to disclose to the court that there was a counterclaim for $70,000 by the company against the respondent.

In the first respondent's application to strike out the statement of claim of the appellants the affidavits supporting the application set out the background facts just referred to. The first respondent sought to strike out the statement of claim on the grounds that it disclosed no reasonable cause of action, was misconceived and was an abuse of process of the court.

At the hearing of the appeal before the learned judge the respondents raised the question of locus standi of the appellants who were directors of the company to seek the reliefs. The respondents also raised the question of jurisdiction in that there had been no appeal against the winding-up order made in 1986.

Counsel for the appellants maintained that they were the major shareholders of the company and were aggrieved by the winding-up order as well as by the conduct of the liquidator and they were seeking to have the winding-up order set aside and for the liquidator to be removed.

In a brief but precise written grounds of decision the learned judge summed up the issue at p 43 in the appeal record:

> What the plaintiffs were trying to do by this writ was in effect to appeal against the decision of the winding up court and doing it some three years after the order for winding-up had been made and in a court of co-ordinate jurisdiction which has no jurisdiction to hear such an appeal, using the wrong procedures and in any event without the locus standi to do so. As such the whole proceedings ab initio was misconceived. The writ and statement of claim should have been struck off.

It would appear on the face of it that the appeal was a non-starter. However before we could hear the merits

of the appeal the respondents raised a preliminary objection that the appeal should be dismissed in limine because there was no appeal before this court as there was no leave obtained under s 68(1)(a) of the Courts of Judicature Act 1964 ('the Act').

It is common ground that the order appealed against was made in chambers and that the learned judge had decided that no further argument in open court was required and accordingly had issued a certificate under O 56 r 2(2) of the Rules of the High Court 1980.

It is contended by the respondents in the preliminary objection that the appeal was not properly brought before this court on the grounds that notwithstanding that s 68(2) of the Act had been complied with no leave had been obtained under s 68(1)(a) of the Act.

Section 68(1)(a) of the Act states:

> No appeal shall be brought to the Supreme Court in any of the following cases:
>
> (a) when the amount or value of the subject matter of the claim (exclusive of interest) is less than one hundred thousand ringgit, except with the leave of the Supreme Court or a Judge of the High Court.

Section 68(2) of the Act states:

> No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

The issue of this appeal is simply whether the appellants need to obtain leave under s 68(1)(a) when the learned judge had certified that he required no further argument under s 68(2).

It is the contention of the appellants that in the absence of express words subjecting s 68(2) to s 68(1) the specific and express provision of s 68(2) should apply to the exclusion of s 68(1)(a) in so far where an appeal is brought against an order made by a judge of the High Court in chambers. In *TO Thomas* v *KCI Reddy & Anor*[1] the High Court judge heard the application in chambers and made an order in terms of the application of the first defendant. The plaintiff requested the learned judge to have the matter argued further in open court. This was done and after hearing prolonged arguments and an adjournment for consideration, the learned judge affirmed the order which he had made in chambers.

The plaintiff appealed against this order to the Federal Court. At the outset of the hearing the first defendant by notice of motion applied that the appeal be dismissed upon the ground that it was incompetently brought as no leave had been obtained under s 68(2) of the Act.

After considering O 54 r 22A of the Rules of the Supreme Court 1957 and the old s 68(2) of the Act which states that 'No appeal shall lie from an interlocutory order made by a judge of the High Court in Chambers unless the judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court', Gill CJ expressed his view at p 91 that:

> It is to be observed that on an application made to him under O 54 r 22A by any party dissatisfied with an order made in chambers, the judge has two courses open to him. He may either adjourn the matter into court and hear further argument, or he may certify in writing that he requires no further argument. If he adopts the latter course and issues a certificate, there is a right of appeal without leave by reason of the specific provision to that effect in sub-s (2) of s 68 of the Act.

The right of appeal without leave there referred to leave under s 68(2) of the Act.

Section 68 of the Act, as the marginal note states, deals with 'non-appealable matters'. This means that s 68 prescribes what the matters are which may not be brought before the Supreme Court. Section 68(1)(a) of the Act speaks of 'amount of the claim' and 'value of the subject matter of the claim'. No appeal may be brought to the Supreme Court when the amount of the claim is less than $100,000 or when the value of the subject matter of the claim is less than $100,000 except with leave. The provision is an absolute embargo.

The most correct approach to s 68 of the Act is to read sub-s (1)(a) as the dominant provision. To do otherwise would erode the real object of s 68(1)(a) which is to prevent cases involving less than $100,000 be brought to the Supreme Court without leave.

Cases like *TO Thomas* v *KCI Reddy & Anor*[1] and *Central Securities (Holdings) Bhd* v *Haron bin Mohd Zaid*[2] Chang Min Tat FJ dealt with the requirement of s 68(2) of the Act:

> Leave from Federal Court or from a judge of the High Court is not a sine qua non, without which an appeal cannot proceed, if an application has been made for further argument within four days and the judge has certified, after application that he requires no further argument. Leave is only required if no application has been made and no certificate has been issued.

Again, the leave referred to is leave under s 68(2) of the Act.

In *Sinnathamby & Anor* v *Lee Chooi Ying*[3] the learned judge in the High Court, after hearing a preliminary objection by the respondent in open court, ordered that the writ of summons and statements of claim of the appellants be struck out and judgment be entered in the respondent's favour against the appellants on the

counterclaim. The said order was made pursuant to the respondent's summons-in-chambers, which was directed to be heard in open court. As the amount or value of the subject matter at the trial was less than $100,000 the appeal could only be brought with leave of the Supreme Court or a judge of the High Court. Leave to appeal was obtained by the appellants from the judge of the High Court but owing to a misunderstanding of the rules applicable the notice of appeal was filed out of time.

Mohamed Azmi SCJ on behalf of this court among other things dealt with the question of notice of appeal filed before leave was obtained and when referring to s 68(1)(a) of the Act and r 49(1) of the Rules of the Supreme Court 1980 said:

> But s 68(1)(a) provides that, 'No appeal shall be brought to the Supreme Court' when the amount or value of the subject matter at the trial is less than $100,000 except with leave of the Supreme Court or a judge of the High Court. Reading these two provisions together, it is explicit that leave to appeal must first be obtained before notice of appeal can validly be filed and served, although the time limited for appeal would run from the various events specified in r 56 RSC. (See *Tractors Malaysia Bhd* v *Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118.)

It is implicit in the judgment in *Sinnathamby*[3] that leave under s 68(1) was required.

It is wrong to construe 68(1)(a) as a general provision and that 68(2) deals specifically with matters in chambers. The two provisions should be read together.

The operative words in s 68(1)(a) are 'the *amount* or *value* of the subject matter of the claim'. The words 'at the trial' which appeared in s 68(1)(a) before the amendment in 1987 have been left out which restricted the scope to the amount or value of the subject matter at the trial. The present s 68(1)(a) is wider in scope and covers winding-up matters as in this case where the judgment debt which had brought the winding-up order is less than $100,000. The term 'subject matter' was dealt with in *Studham* v *Stanbridge*[4] which was an interpleader proceeding. Cave J said:

> The point raised is as to the meaning of O LA r 12 of the County Court Rules 1889. The higher scale of costs in force in the county court is threefold. Column A applies to cases where the subject-matter or the sum recovered exceeds 10*l* and does not exceed 20*l* and Col B where it exceeds 20*l* and does not exceed 50*l*, and Col C where it exceeds 50*l*. The question here is whether the claimant's costs come under Col C, as the learned county court judge has decided, or whether they do not. Rule 12 provides that in interpleader proceedings the 'subject-matter' shall mean in the case of a claimant (which is this case) 'the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged'. Now, here the county court judge has found that the amount of the value of the goods the claim to which was allowed was 51*l*, and he has adjudged 10*l* damages. Column C therefore applies because the subject-matter exceeds 50*l*.

It is clear therefore the court does not merely look at the relief sought but also considers the value of the judgment if it can be ascertained.

We uphold the preliminary objection and accordingly dismiss the appeal with costs. Deposit to the respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Low Hop Bing & Associates*; *Lim Kean Siew & Co.*

Reported by *Prof Ahmad Ibrahim*

Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal

SUPREME COURT (KUCHING) — CIVIL APPEAL NOS 02-305-1990 AND 02-336-1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND JEMURI SERJAN SCJJ
15 JUNE 1991

Land Law — Charge — Charge of land and building containing shop lots — Shot lots sold to purchasers — Agreement that individual purchasers should pay redemption sums for lots to chargee — Purchasers taking possession of shop lots — Failure of chargor to pay loan amount — Application for order of sale of land and building including shop lots sold to purchasers — Indefeasible title — Intervention of equity — Purchasers contending that circumstances were not just to grant order for sale — Sarawak Land Code (Cap 81), ss 132 & 148

In this case the appellant in SCAA 02-305-1990 and the first appellant in SCAA 02-336-1990 had charged the land and building known as Kuching Plaza to the respondent to secure the sum of $5m lent by the respondent. The building consisted of shop lots and some of them had been sold to purchasers (second to fifth appellants). It was agreed that the purchasers should pay the redemption sum for the lots bought to the respondent. The purchasers paid the redemption sums and took possession of the shop lots. Subsequently the respondent demanded payment of the sum of $1,531,858.86 and interest which remained unpaid from the first appellant. On failure of the first appellant to pay the amount claimed the respondent applied for an order of sale to include the shop lots already sold to the second to fifth appellants. The learned trial judge gave judgment for the respondent and the appellants appealed.

Held, allowing the appeals:

(1) Although the respondent claimed to have an indefeasible title to the land, this did not preclude an order for specific performance of a contract of sale by the proprietor or other instances of equity acting in personam. The power to grant an order for sale under s 148 of the Sarawak Land Code is discretionary as the court has to be satisfied that it seems just in the circumstances to make the order.

(2) The evidence in this case showed that the respondent had looked to the purchasers of the shop lots to redeem the property charged by the first appellant. The respondent itself